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No. 87-1469

In the Supreme Court of the United States

OCTOBER TERM, 1988

MAJOR GENERAL WILLIAM A. HORNSBY, ET AL.,
PETITIONERS

v.

DAVID STINSON

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether the test devised in *Mindes* v. *Seaman*, 453 F.2d 197 (5th Cir. 1971), should be used to determine whether a servicemember in the National Guard may bring suit under 42 U.S.C. 1981 or 1983 challenging a personnel decision made by superior officers.

TABLE OF CONTENTS

	Page
Statement	1
Discussion	6
Conclusion	20

TABLE OF AUTHORITIES

Cases:

Allen v. *McCurry*, 449 U.S. 90 (1980) 10
Bivens v. *Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971) 4
Brown v. *Glines*, 444 U.S. 348 (1980) 8, 9, 12, 18
Brown v. *United States*, 739 F.2d 362 (8th Cir. 1984), cert. denied, 473 U.S. 904 (1985) 14
Burns v. *Wilson*, 346 U.S. 137 (1953) 9, 13
Chappell v. *Wallace*, 462 U.S. 296 (1983) 4, 5, 9, 11, 12
Christoffersen v. *Washington State Air Nat'l Guard*, No. 85-4315 (Aug. 31, 1988) 13, 14, 16
Crawford v. *Texas Army Nat'l Guard*, 794 F.2d 1034 (5th Cir. 1986) 6, 12, 18, 19
Department of the Navy v. *Egan*, No. 86-1552 (Feb. 23, 1988) 9
Dillard v. *Brown*, 652 F.2d 316 (3d Cir. 1981) 16
Frontiero v. *Richardson*, 411 U.S. 677 (1973) 12, 18
Feres v. *United States*, 340 U.S. 135 (1950) 8
Gilligan v. *Morgan*, 413 U.S. 1 (1973) 7, 8, 9, 10
Goldman v. *Weinberger*, 475 U.S. 503 (1986) 12, 18
Holdiness v. *Stroud*, 808 F.2d 417 (5th Cir. 1987) 13
Jorden v. *National Guard Bureau*, 799 F.2d 99 (3d Cir. 1986), cert. denied, No. 86-1382 (Oct. 5, 1987) 14, 16
Mahone v. *Waddle*, 564 F.2d 1018 (3d Cir. 1977), cert. denied, 438 U.S. 904 (1978) 10
Martelon v. *Temple*, 747 F.2d 1348 (10th Cir. 1984), cert. denied, 471 U.S. 1135 (1985) 6, 10, 11, 12, 14-15
Mindes v. *Seaman*, 453 F.2d 197 (5th Cir. 1971) 5, 19
Noyd v. *Bond*, 395 U.S. 683 (1969) 19
Orloff v. *Willoughby*, 345 U.S. 83 (1953) 9, 19

Cases—Continued: Page

Parker v. *Levy*, 417 U.S. 733 (1974) 8, 12-13
Penagaricano v. *Llenza*, 747 F.2d 55 (1st Cir. 1984) 13, 17
Rostker v. *Goldberg*, 453 U.S. 57 (1981) 7
Runyon v. *McCrary*, 427 U.S. 160 (1976) 10
Schlesinger v. *Councilman*, 420 U.S. 738 (1975) 8, 9
United States v. *Brown*, 348 U.S. 110 (1954) 9
United States v. *O'Brien*, 391 U.S. 367 (1968) 7
United States v. *Shearer*, 473 U.S. 52 (1985) 8
United States v. *Stanley*, No. 86-393 (June 25, 1987) 15
Wallace v. *Chappell*, 661 F.2d 729 (9th Cir. 1981) 10

Constitution, statutes, regulations and rule:

U.S. Const.:
Art. I, § 8:
Cl. 12 2
Cls. 12-16 7
Cl. 15 2
Cl. 16 2
Department of Defense Authorization Act, 1984, Pub. L. No. 98-94, 97 Stat. 631 1
10 U.S.C. 101(11) 2
10 U.S.C. 101(13) 2
10 U.S.C. 262 2
10 U.S.C. 864-869 13
10 U.S.C. (Supp. IV) 867h(1) 13
10 U.S.C. 1552(a) 11
10 U.S.C. 1552(c) 11
10 U.S.C. (Supp. IV) 3040 3-4
10 U.S.C. 3500 2
32 U.S.C. (Supp. IV) 101(19) 2
32 U.S.C. 102 2
32 U.S.C. 110 2
32 U.S.C. 502(f) 1
42 U.S.C. 1981 ..... 4, 5, 6, 14, 19, 20
42 U.S.C. 1983 ..... 4, 5, 6, 7, 10, 11, 13, 14, 15, 19, 20

Statutes, regulations and rule—Continued: Page

42 U.S.C. 2000e *et seq.* 4

National Guard Reg. 600-21 (Aug. 15, 1985) 2, 17

App. E, § (g) 18

National Guard Reg. 600-5 (May 15, 1986):

para. 1-7 2

para. 3-14 2

Sup. Ct. R. 19.6 17

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This brief is submitted in response to the Court's order inviting the Solicitor General to express the views of the United States.

STATEMENT

1. In October 1982, respondent, David Stinson, a black male, joined the Alabama National Guard on a full-time basis as a Training NCO/System Supervisor (Pet. App. A1). He served in the Active Guard/Reserve (AGR) Program, which is a military program authorized under 32 U.S.C. 502(f) whereby Guard personnel serve in a "full-time duty status, for the purpose of organizing, administering, recruiting, instructing, or training the reserve components of the National Guard." Department of Defense Authorization Act, 1984, Pub. L. No. 98-94, 97 Stat. 631. As a full-time uniformed soldier in the AGR Program, re-

spondent received pay from the United States, was entitled to benefits provided by law to servicemembers on federal active duty, and was required to adhere to the standards of conduct demanded of servicemembers on federal active duty. See National Guard Regulation (NGR) 600-5, paras. 1-7 & 3-14 (May 15, 1986).[1] Respondent's daily activities, however, were controlled by state officials in the Alabama National Guard (see 32 U.S.C. (Supp. IV) 101(19)).

In March 1985, a white male was selected for a supervisory position Stinson had sought. Stinson filed a complaint with the Equal Employment Opportunity Commission, which informed him on May 31, 1985, that it lacked jurisdiction because he was a member of the armed forces. Stinson then filed a complaint with the National Guard Bureau pursuant to NGR 600-21 (Aug. 15, 1985) alleging that he had been denied the position on account of his race. While his complaint was pending, Stinson completed his tour of duty and was not recommended for renewal by his immediate supervisor because of poor job performance (Affidavit of George F. Hulsey, Mar. 13, 1986). He was then separated from the Guard in September 1985.

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[1] The National Guard is "an integral part of the first line defenses of the United States" (32 U.S.C. 102). The purpose of the Guard "is to provide trained units and qualified persons available for active duty in the armed forces, in time of war or national emergency and at such other times as the national security requires" (10 U.S.C. 262). All members of the state National Guards have a dual status in that they are also members of the National Guard of the United States, which is a reserve component of the Army and Air Force (see 10 U.S.C. 101(11) and (13)) established under Art. I, § 8, Cl. 12 (congressional authority to raise and support armies). The constitutional authority for federal control and oversight of the Guard in its state capacity is located in Art. I, § 8, Cls. 15 (congressional authority to call forth the militia) and 16 (congressional authority to organize, arm, and discipline the militia). The President prescribes regulations and issues orders necessary to organize, discipline, and govern the National Guard (32 U.S.C. 110), and he is empowered to call the Guard into national service (10 U.S.C. 3500).

The investigation into Stinson's charge that he had been discriminatorily denied the supervisory position he sought continued. Lieutenant Colonel George Beck, a Judge Advocate General officer in the Alabama National Guard who had personally interviewed Stinson's supervisors and co-workers, concluded that Stinson had been denied the position for nondiscriminatory reasons.[2] In May 1986, the Alabama Adjutant General, Major General William Hornsby, filed a final decision in which he concluded that respondent's allegation of discrimination in the denial of the promotion lacked merit (Pet. App. A2). The National Guard Bureau, an adjunct of the United States Departments of the Army and the Air Force (10 U.S.C. (Supp.

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[2] Beck's report stated: "While SSG Stinson appears to possess higher educational qualifications and military formal education as a Training NCO than SSG Whetsone [the person who was selected for the supervisory position], * * * additional qualifications for the job were lacking in SSG Stinson. For example, Commander Shipp indicates that he chose SSG Whetstone to fill the vacancy over SSG Stinson because of SSG Stinson's poor military attitude and inability to properly follow orders. Observations by MSG Gillilard and CW2 George F. Hulsey, Jr. illustrate SSG Stinson's apparent lack of ability to follow the SOP [Standard Operating Procedures] and unit guidelines. CW2 George F. Hulsey, Jr. has counseled SSG Stinson many times about his inability to properly complete military documents. Both MSG Gillilard and CW2 Hulsey indicate that the unit has received numerous complaints from higher headquarters because of SSG Stinson's inability to adequately and completely follow the State and Unit SOP." Findings and recommendation of Lt. Col. George L. Beck, Jr., regarding Discrimination Complaint filed by SSG Stinson at 1-2 (Apr. 16, 1986). Beck also noted that "[n]one of SSG Stinson's Supervisors nor co-workers consider race to have been a factor in making the assignment," that "[t]raining operations [in which SSG Stinson has been involved] received more than usual criticism from headquarters," that "[b]lacks interviewed deny any racial discrimination and believe that blacks and whites are treated equally within the unit," and that "[n]one of SSG Stinson's supervisors consider[ed] SSG Stinson to be doing a satisfactory job in his assignment" (*id.* at 2).

IV) 3040), reviewed the decision and concurred with the state's finding. Letter from the Chief of the National Guard's Office of Human Resources to the Alabama Adjutant General (Aug. 5, 1986).

2. On April 9, 1986, while his charge of discriminatory denial of the supervisory position was pending, Stinson filed this action in the United States District Court for the Middle District of Alabama. He named four superior officers as defendants in their individual and official capacities and alleged that the Alabama National Guard had engaged in racially discriminatory and retaliatory employment practices in refusing to advance him to the supervisory position and in terminating his employment. He sought relief under Title VII, 42 U.S.C. 2000e *et seq.*, and under 42 U.S.C. 1981 and 1983. Specifically, he sought reinstatement and advancement, back pay, injunctive relief, and other further relief which the court might deem appropriate.

The district court dismissed Stinson's action for failure to state a claim upon which relief could be granted (Pet. App. C1-C11). With respect to Stinson's Title VII claim, the court stated that "courts have uniformly held that neither Title VII nor its standards are applicable to members of the Armed Forces or members of the reserve components of those forces" (*id.* at C7-C8). Since Stinson "was a full-time uniformed employee on military duty with the Alabama National Guard" (*id.* at C8-C9), the court concluded that he had no claim pursuant to Title VII.

Guided by *Chappell* v. *Wallace*, 462 U.S. 296 (1983), the court rejected Stinson's claims under Sections 1981 and 1983 as well. The Court in *Chappell* had held that, in light of the unique disciplinary structure of the armed forces, military personnel may not bring discrimination claims against superior officers and seek a remedy under *Bivens* v. *Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971). The district court con-

cluded that the same result should follow in the case of Sections 1981 and 1983 claims, which it considered analogous to *Bivens* claims (Pet. App. C9-C11).

3. The court of appeals affirmed the dismissal of Stinson's Title VII claim,[3] but reversed the dismissal of his claims under Sections 1981 and 1983 (Pet. App. A1-A27). With respect to the Sections 1981 and 1983 claims, the court first observed that this Court in *Chappell* stated that it had not held that " 'military personnel are barred from all redress in civilian courts for constitutional wrongs suffered in the course of military service' " (Pet. App. A11 (quoting 462 U.S. at 304)). The court of appeals then held that full-time servicemembers in the National Guard who bring actions for constitutional violations under Sections 1981 or 1983 must have the allegations in their complaints tested for reviewability pursuant to the two-step procedure articulated in *Mindes* v. *Seaman*, 453 F.2d 197, 201 (5th Cir. 1971). Under *Mindes*, a court first determines whether a servicemember alleging a violation of a constitutional right, a statute, or a regulation has exhausted his intraservice remedies. If he has, the court then examines the facts alleged and balances four factors—the nature and strength of the plaintiff's claim, the potential injury to the plaintiff if review is refused, the anticipated extent of interference with military functions if the claim is reviewed, and the extent to which military expertise and discretion was involved in the challenged action—to determine whether the plaintiff may proceed. Pet. App. A12-A14; 453 F.2d at 201-202. The court of appeals remanded the case to the district court with instructions that it use the *Mindes* test to determine whether Stinson may proceed

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[3] The court of appeals agreed with the district court that Stinson "was a uniformed member of, and on full-time military duty with, the Alabama National Guard" (Pet. App. A8) and that Title VII's remedies are not available to members of the armed forces (*id.* at A7). The Title VII claim is no longer at issue.

with his claims under Sections 1981 and 1983 (Pet. App. A14).

Senior Judge Henderson concurred, stating that his agreement with the decision stemmed from "deference to the precedential weight of *Mindes*" (Pet. App. A16). He further stated, however, that the en banc court should reexamine the applicability of that case in light of *Chappell* and consider whether "claims such as these [are] nonjusticiable without resort to the cumbersome *Mindes* analysis" (*ibid.*). He concluded: "Although the *Chappell* decision expressly left open the right of military personnel to bring constitutional grievances to court, there can be little doubt that such access does not extend to 'discrete personnel matters.' Boldly stating this conclusion, as the Fifth Circuit Court of Appeals has done [in *Crawford* v. *Texas Army Nat'l Guard*, 794 F.2d 1034 (5th Cir. 1986)], without requiring the district court to address the *Mindes* test would bring this circuit closer in line with the Supreme Court on this issue and would perhaps be fairer to potential litigants." Pet. App. A24-A25 (footnote and citation omitted).

Judge Hill dissented, agreeing with the district court that *Chappell* required the dismissal of Stinson's claims (Pet. App. A26-A27).

The court of appeals denied the defendants' suggestion of rehearing en banc (Pet. App. B1-B3).

DISCUSSION

In our view, the court below erred in concluding that it is appropriate to examine Stinson's claim under the *Mindes* test to determine whether it is justiciable. Rather, like the Fifth Circuit in *Crawford* v. *Texas Army Nat'l Guard*, 794 F.2d 1034 (1986) and the Tenth Circuit in *Martelon* v. *Temple*, 747 F.2d 1348 (1984), cert. denied, 471 U.S. 1135 (1985), the court should have concluded that servicemembers may challenge personnel decisions

only through the remedies created specifically for that purpose. For the reasons given below, however, we believe that this conflict between the courts of appeals has little practical importance in the present context of this case, and that review is therefore not warranted.

1. By its literal terms, Section 1983 could be read to apply to a suit brought by a servicemember of a state national guard against his superior officers for an alleged deprivation "of any rights, privileges, or immunities secured by the Constitution and laws" (42 U.S.C. 1983). Congress's failure expressly to exempt the military from such suits cannot, however, be understood as a determination that all such suits fall within the scope of Section 1983. To the contrary, this Court's cases indicate that, in the absence of clear and explicit congressional intent, a general statute such as Section 1983 should not be construed to encompass claims by soldiers against their superior officers for discrete military personnel decisions.

The Constitution gives Congress the power "[t]o raise and support Armies," "[t]o provide and maintain a Navy," "[t]o make Rules for the Government and Regulation of the land and naval Forces," and "[t]o provide for organizing" and "calling forth the Militia." U.S. Const. Art. I, § 8, Cls. 12-16. These powers are "broad and sweeping" (*United States* v. *O'Brien*, 391 U.S. 367, 377 (1968)), and it is well established that, in the regulation of the military, the role of the courts is decidely subordinate to that of Congress. "[P]erhaps in no other area has the Court accorded Congress greater deference. * * * Not only is the scope of Congress' constitutional power in this area broad, but the lack of competence on the part of the courts is marked." *Rostker* v. *Goldberg*, 453 U.S. 57, 64-65 (1981). Indeed, "it is difficult to conceive of an area of governmental activity in which the courts have less competence." *Gilligan* v. *Morgan*, 413 U.S. 1, 10 (1973).

Congress, in turn, has recognized that substantial discretion must be afforded to the military in molding an effective fighting force. *Brown* v. *Glines*, 444 U.S. 348, 360 (1980). "To prepare for and perform its vital role, the military must insist upon a respect for duty and a discipline without counterpart in civilian life." *Schlesinger* v. *Councilman*, 420 U.S. 738, 757 (1975). For this reason, "the military is, by necessity, a specialized society separate from civilian society. * * * [T]he military has, again by necessity, developed laws and traditions of its own during its long history." *Parker* v. *Levy*, 417 U.S. 733, 743 (1974). These "laws and traditions * * * are founded on unique military exigencies as powerful now as in the past. Their contemporary vitality repeatedly has been recognized by Congress." *Schlesinger* v. *Councilman*, 420 U.S. at 757.

Courts, therefore, have been especially reluctant to intervene in any matter which "goes directly to the 'management' of the military [and] calls into question basic choices about the discipline, supervision, and control of a serviceman." *United States* v. *Shearer*, 473 U.S. 52, 58 (1985). The "complex, subtle, and professional decisions as to the composition, training, equipping and control of a military force are essentially professional military judgments, subject always to civilian control of the Legislative and Executive Branches." *Gilligan* v. *Morgan*, 413 U.S. 1, 10 (1973) (emphasis omitted). On such matters, it is not appropriate for a "civilian court to second-guess military decisions." *United States* v. *Shearer*, 473 U.S. at 57.

In view of these principles, it would be inappropriate for courts to presume that a statute of general applicability in civilian contexts applies equally to military decisions. In the military context, this Court has always looked for an express mandate before exercising its jurisdiction in a way that might interfere with the smooth functioning of the military. See, *e.g.*, *Feres* v. *United States*, 340 U.S. 135 (1950) (declining to apply Federal Tort Claims Act to suits

by servicemen for service-related injuries); *Orloff* v. *Willoughby*, 345 U.S. 83 (1953) (declining to review propriety of duty assignment); *Burns* v. *Wilson*, 346 U.S. 137, 142, 144 (1953) (plurality opinion) (giving narrow interpretation to scope of federal habeas corpus relief available to servicemen); *Gilligan* v. *Morgan*, 413 U.S. at 10 (declining to assume jurisdiction over training, weaponry and orders of National Guard); *Schlesinger* v. *Councilman*, 420 U.S. at 757-758 (limiting ability of servicemen to obtain injunctive relief for alleged wrongs, including constitutional violations); *Chappell* v. *Wallace*, 462 U.S. 296, 304 (1983) (refusing to permit military personnel to maintain suit to recover damages from a superior officer for alleged constitutional violations); *Department of the Navy* v. *Egan*, No. 86-1552 (Feb. 23, 1988) (declining to permit Merit Systems Protection Board, in the course of reviewing an adverse action suffered by a civilian employee of the Navy, to review security clearance determination made by the Navy).

It is against the background of these cases that the propriety of respondent's suit must be judged. It cannot be assumed, simply because Congress has provided a general remedy against violations by state officials of constitutional and statutory rights, that Congress intended that remedy to apply to suits by servicemembers in the state National Guard against their superior officers. Rather, in the absence of clear and explicit congressional intent, the "peculiar and special relationship of the soldier to his superiors" (*United States* v. *Brown*, 348 U.S. 110, 112 (1954)) counsels against recognizing claims by soldiers against their superior officers. "[C]ourts must be careful not to 'circumscribe the authority of military commanders to an extent never intended by Congress.' " *Brown* v. *Glines*, 444 U.S. at 360 (citation omitted).[4]

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[4] The vitality of the principle that it should not be presumed that Congress intended to permit suit by a servicemember against his

In the instant case, therefore, the threshold inquiry should be whether Congress specifically intended the relevant statutes to be used by soldiers to sue their superior officers, a question the court below failed to address. Had it done so, it would have found no affirmative evidence, either in the statutory language of the legislative history, that Congress explicitly intended Sections 1981 and 1983 to provide causes of action for soldiers who allege injuries suffered incident to military service. See *Martelton* v. *Temple*, 747 F.2d at 1351; cf. *Allen* v. *McCurry*, 449 U.S. 90, 98-99 (1980) (discussing legislative history of Section 1983); *Runyon* v. *McCrary*, 427 U.S. 160 (1976) (discussing legislative history of Section 1981); *Mahone* v. *Waddle*, 564 F.2d 1018 (3d Cir. 1977) (discussing Sections 1981 and 1983), cert. denied, 438 U.S. 904 (1978). In the absence of express evidence that Congress intended Sections 1981 and 1983 to be used by soldiers to sue their superior officers, such claims should not be permitted, and analysis under the *Mindes* test is not necessary.

2. This Court found application of the *Mindes* test unnecessary in *Chappell*. In that case, black Navy enlisted men, claiming that they had suffered discrimination, sought relief under *Bivens*. The Ninth Circuit, like the court below, decided that "the *Mindes* test * * * provides an appropriate framework for determining which military decisions are reviewable and which are not" (*Wallace* v. *Chappell*, 661 F.2d 729, 734 (1981)), and remanded the case for the district court to apply that test (*id.* at 738). This Court reversed, concluding that the "special nature of military life—the need for unhesitating and decisive action by military officers and equally disciplined responses by

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superiors in the absence of specific evidence is not diminished by the facts that the National Guard is involved here. The command relationship among National Guard servicemembers is identical to the command relationship among other federal servicemembers. See *Gilligan* v. *Morgan*, 413 U.S. at 7; n.1, *supra*.

enlisted personnel—would be undermined by a judicially created remedy exposing officers to personal liability at the hands of those they are charged to command" (462 U.S. at 304). The Court also noted that the Board for Correction of Naval Records, whose decisions may be reviewed only under the arbitrary and capricious standard, is a forum in which the plaintiffs could seek relief (*id.* at 303).[5] The Court held that "military personnel may not maintain a suit to recover damages from a superior officer for alleged constitutional violations" (*id.* at 305).

The Fifth Circuit and the Tenth Circuit have correctly concluded, on reasoning analogous to that in *Chappell*, that military personnel in the National Guard are barred from challenging personnel decisions under Section 1983. In *Martelon*, the Tenth Circuit first noted that this Court's decision in *Chappell* was based on the conclusion that " '[c]ivilian courts must, at the very least, hesitate long before entertaining a suit which asks the court to tamper with the established relationship between enlisted military personnel and their superior officers; that relationship is at the heart of the necessarily unique structure of the military establishment" (747 F.2d at 1350 (quoting 462 U.S. at 300)). The difference between the *Bivens* suit in *Chappell* and the Section 1983 suit before it, the court concluded, was merely "the identity of the defendants" (747 F.2d at 1350). Since "[b]y the passage of § 1983, Congress never intended" to authorize actions by members of the armed forces alleging "liability on the part of military

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[5] Boards for the Correction of Military Records, which are composed of civilians appointed by the Secretary of each branch of the armed forces, constitute broad avenues by which servicemembers may obtain federal court review of a variety of claims pertaining to their service records. Congress has vested each Secretary, acting through such a Board, with plenary power to "correct any military record * * * when he considers it necessary to correct an error or remove an injustice" (10 U.S.C. 1552(a)). In appropriate cases the Board may issue orders leading to reinstatement and an award of back pay (10 U.S.C. 155(c)).

superiors" (*id.* at 1351), the court concluded, without analysis under *Mindes*, that the "plaintiff's § 1983 claim has no merit" (*ibid.*).

The Fifth Circuit in *Crawford* similarly concluded that "Section 1983 * * * claims, like those predicated on *Bivens*, invite judicial second-guessing of military actions and tend to overlap the remedial structure created within each service" (794 F.2d at 1036). It accordingly held, without applying the *Mindes* test, that the plaintiff's "requests for money damages, to the extent they are based upon alleged constitutional violations and 42 U.S.C. § 1983, are precluded by *Chappell*" (*ibid.*). The court went on to reject the plaintiff's contention that he could seek injunctive relief in the form of reinstatement. While the Court in *Chappell* had stated that "military personnel are [not] barred from all redress in civilian courts for constitutional wrongs suffered in the course of military service" (462 U.S. at 304), the Fifth Circuit noted that this Court had never authorized suit challenging "military personnel decisions" (794 F.2d at 1036). Rather, the Fifth Circuit correctly noted that the Court had authorized only "challenges to the facial validity of military regulations [that] * * * were not tied to discrete personnel matters" (*ibid.*).[6] The Fifth Circuit further concluded that extending the exception noted in *Chappell* to allow military per-

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[6] The court in *Chappell* cited (462 U.S. at 304-305), as exemplifying the cases where this Court had allowed military personnel to seek injunctive relief, *Brown* v. *Glines*, 444 U.S. 348 (1980) (challenge to a regulation requiring prior approval for soliciting signatures on a petition); *Frontiero* v. *Richardson*, 411 U.S. 677 (1973) (challenge to a statute requiring female members of the armed forces, but not males, to prove that their spouses were dependent on them for over one-half of their support in order to obtain certain benefits); and *Parker* v. *Levy*, 417 U.S. 733, 741 (1974) ("void for vagueness" challenge to

sonnel to challenge personnel actions by seeking injunctive relief "could swallow *Chappell*'s rule of deference" (*ibid.*).[7]

In contrast, like the court below, the First Circuit concluded in *Penagaricano* v. *Llenza*, 747 F.2d 55 (1984), that the *Mindes* test should be used to determine whether a member of the National Guard could seek reinstatement. Rather than remanding to the district court (see *id.* at 60 n.7), however, the court analyzed the plaintiff's claim under *Mindes* (*id.* at 61-64) and concluded that the plaintiff's claim was not justiciable (*id.* at 64). Similarly, in *Christoffersen* v. *Washington State Air Nat'l Guard,* No 85-4315 (Aug. 31, 1988), slip op. 10, the Ninth Circuit found it unnecessary to "decide whether *Chappell* bars any or all section 1983 claims for alleged civil rights violations

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provisions of the Uniform Code of Military Justice); see also *Goldman* v. *Weinberger,* 475 U.S. 503 (1986) (challenge to a regulation prohibiting the wearing of a yarmulke).

In addition to challenging the facial validity of military regulations, a servicemember claiming constitutional flaws in his conviction by a court-martial can—after appealing through several layers of intramilitary review, culminating in the Court of Military Appeals (10 U.S.C. 864-869)—seek relief in federal court either by petitioning for a writ of certiorari (10 U.S.C. (Supp. IV) 867h(1)) or seeking a writ of habeas corpus. *Burns* v. *Wilson,* 346 U.S. 137 (1953).

[7] In *Holdiness* v. *Stroud,* 808 F.2d 417, 423 (1987), the Fifth Circuit concluded: "[W]e follow *Crawford* in applying the *Chappell* rule to Guard members and, using the tests in *Chappell* and *Mindes,* hold that the remedy sought by Holdiness [damages under Section 1983] would be so disruptive to military service that the claim should not be entertained." While this statement might be taken to suggest that the *Mindes* analysis is applicable in determining the justiciability of a National Guard members' Section 1983 claim, the court simply dismissed the claim without specficially considering the *Mindes* analysis or remanding to the district court for that purpose. Accordingly, *Holdiness* does not fairly stand for the proposition that the *Mindes* analysis must be worked through in order to determine whether to dismiss challenges to personnel decisions brought under Section 1983.

by military personnel." Instead, the court applied the *Mindes* test to the plaintiff's claims for reinstatement and damages, and concluded that those claims were non-justiciable under *Mindes* (slip op. 18).

There is, therefore, disagreement in the courts of appeals as to whether the *Mindes* test has any continuing vitality in determining whether members of the National Guard may challenge personnel decisions under the post-Civil War civil rights statutes.[8] The approach taken by the court below and the First and Ninth Circuits—determining justiciability under *Mindes*—differs from the approach taken by the Fifth and the Tenth Circuits. It appears, however, that most actions challenging personnel decisions would be dismissed under the *Mindes* test in any event, as in *Penagaricano* and *Christoffersen,* since such actions by their nature interfere with military decision-making. The first two *Mindes* factors, which concern the potential harm to the plaintiff if his claim is not heard, will generally favor review, while the last two factors, which concern the harm to the military if the claim is heard, will generally favor dismissal of the claim. Since the *Mindes* court "indicate[d] that the above factors should be balanced but declined to indicate how they should be weighted" (747 F.2d at 63), the test is itself of little help in

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[8] In addition to the post-*Chappell* decisions of the First, Fifth, Ninth, Tenth, and Eleventh Circuits discussed in the text, the Eighth Circuit, in *Brown* v. *United States,* 739 F.2d 362, 369 (1984), cert. denied, 473 U.S. 904 (1985), employing a test derived from *Feres* and *Chappell,* concluded that a National Guard member could not sue his superior officers under Sections 1981 and 1983, but could seek relief from his fellow Guard members for actions unrelated to military training or personnel decisions. See also *Jorden* v. *National Guard Bureau,* 799 F.2d 99, 108 (3d Cir. 1986), cert. denied, No. 86-1382 (Oct. 5, 1987) (permitting suit for equitable relief but not damages), discussed at pp. 15-18, *infra.*

deciding particular cases involving personnel decisions. The First Circuit was "inclined to weigh the last two factors heavily in view of the reservations many courts have expressed as to a civilian court's authority to countermand a military decision or order that is within the decisionmakers's sphere of discretion and expertise" (*id.* at 63-64). That approach, which makes sense, will almost always lead to the conclusion that a claim challenging a personnel decision is barred.

We believe nonetheless, that application of the *Mindes* test, which requires courts to consider how military expertise and discretion affected a particular decision, itself constitutes undesirable judicial interference. As this Court stated recently in *United States* v. *Stanley,* No. 86-393 (June 25, 1987), slip op. 12-13: "A test for [justiciability] * * * that depends on the extent to which particular suits would call into question military discipline and decisionmaking would itself require judicial inquiry into, and hence intrusion upon, military matters * * *. Even putting aside the risk of erroneous judicial conclusions (which becloud military decision-making), the mere process of arriving at correct conclusions would disrupt the military regime." Thus, the approach of the court below and the First and Ninth Circuits will necessarily intrude on the military to some extent. But until a lower court actually holds, after analysis under the *Mindes* test, that a discrete military personnel decision is cognizable under Section 1983, there is no pressing need for this Court to decide

whether the *Mindes* test should be applied to determine whether a claim is justiciable.

3. The Third Circuit, in *Jorden* v. *National Guard Bureau, supra,* adopted an approach that differs from that of any other court of appeals. It held that a member of the National Guard who was dismissed could not seek damages under Section 1983. Relying, however, on this Court's statement in *Chappell* that not all claims against the military for constitutional violations are barred (799 F.2d at 109), the court held that the plaintiff could seek reinstatement (*id.* at 111). The court noted that it had rejected the *Mindes* test (*id.* at 111 n.16), but instead, under *Dillard* v. *Brown,* 652 F.2d 316 (3d Cir. 1981), "heavily disfavors finding injunctive relief claims against the military non-reviewable" (799 F.2d at 110). Concluding that the plaintiff's claim for reinstatement was not an "extreme case," the court held that the claim was justiciable (*id.* at 111).

The Third Circuit's approach could regularly call military decisions directly into question whenever the plaintiff seeks injunctive relief. Despite the broad language of the opinion, however, the court's holding in *Jorden* was narrowly premised on a complete absence of any intraservice remedies (799 F.2d at 102 n.5). In that case, the Pennsylvania Air National Guard apparently conceded (see *id.* at 102) that there were no remedies within the Guard available to Jorden. Moreover, although Jorden had sought federal intraservice relief by way of a petition to the Air Force Board for Correction of Military Records, the court of appeals noted that there were serious doubts about the Board's ability to afford relief, inasmuch as Jorden sought reinstatement to the state Guard as well as to his position as a federal technician. See also *Christoffersen,* slip op. 13 (Corrections Board "has no power to

force Washington to reinstate appellants in the Washington Guard"); *Penagaricano* v. *Llenza,* 747 F.2d at 57 ("the [Board] has no power to force a state to reinstate the officer in the state's Air National Guard"). The Pennsylvania Air National Guard did not dispute that conclusion in its petition for a writ of certiorari. "Under these exceptional circumstances," we stated (at 8), in our Brief in Opposition in *Sajer* v. *Jorden,* No. 86-1382,[10] "we do not think that the court of appeals acted unreasonably in permitting Jorden to bring his constitutional claims directly to federal court."

In this case, by contrast, it is clear that other remedies are available to National Guard members such as Stinson. The National Guard's regulations prohibit discriminatory treatment, and NGR 600-21 sets forth procedures to be followed where a member of the Guard claims that he suffered discrimination. Indeed, Stinson invoked NGR 600-21 in challenging the decision not to select him for the supervisory position he sought.[11] Moreover, although the issue was not disputed by the Pennsylvania Air National Guard in *Jorden* and there was, therefore, no occasion for us to challenge the premise upon which the court of appeals' decision was based, we believe that members of the

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[10] The chief of the National Guard Bureau, a federal official, was a co-defendant in that case and, hence, a respondent in this Court because he did not join in the state's petition for a writ of certiorari or file one on his own behalf. See Sup. Ct. R. 19.6. We have furnished a copy of our *Jorden* brief to the parties in this case.

[11] It does not appear that Stinson exhausted the remedy available to him under that regulation, as he did not complain about his separation from the Guard, but limited his complaint to the charge that he should have been selected for the supervisory position he sought (see pp. 2-4, *supra*). Stinson could have obtained complete relief had the Guard concluded, in an investigation conducted pursuant to NGR 600-21, that he had been discriminatorily denied the supervisory position he sought and had been improperly separated from the Guard.

National Guard may well be able to obtain sufficient relief from a Board for the Correction of Military Records. Such Boards can order that members of the Guard be reinstated in comparable active federal reserve status and awarded back pay. Although a Correction Board cannot *order* reinstatement in the State National Guard, the practical reality appears to be that such relief is generally forthcoming. In this case, we are informed by the State of Alabama that such reinstatement in the State National Guard would follow as a matter of course from a decision of the Correction Board that Stinson had been improperly discharged.[12]

4. Where intraservice remedies are available to challenge specific military decisions, exhaustion of those remedies should be required before any judicial review is permitted, and such judicial remedy should be confined to review of the adequacy of the military proceedings.[13] Per-

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[12] Similarly, subsection (g) of Appendix E to NGR 600-21, states that where "an administrative review reveals deficiencies in compliance with law or regulation, the case will be returned to the State for appropriate corrective action."

[13] The Fifth Circuit in *Crawford* correctly noted (794 F.2d at 1036) that this Court's decisions permitting immediate recourse to the federal courts have involved attacks by military personnel on the facial validity of statutes or regulations. See, *e.g.*, *Goldman* v. *Weinberger*, 475 U.S. 503 (1986) (challenge to regulation prohibiting the wearing of a yarmulke); *Brown* v. *Glines*, 444 U.S. 348 (1980) (challenge to regulation requiring prior approval to solicit signatures on a petition); *Frontiero* v. *Richardson*, 411 U.S. 677 (1973) (challenge to regulations directing discriminatory payment of spousal benefits). Immediate judicial review is less objectionable in such cases because it does not require intrusion into the specific military judgments made in particular instances. It is also more justified—especially where a violation of constitutional rights is asserted—given the broad-based effects of many statutes and regulations.

mitting a servicemember to bring an initial judicial challenge to a discrete personnel decision or other specific action by military authorities—and thereby make the federal courts an alternative forum, rather than a forum of last resort for such complaints—would undermine the system of remedies established by Congress within the armed forces. As this Court has noted (*Noyd* v. *Bond,* 395 U.S. 683, 696 (1969)): "If the military * * * do[es] vindicate [the servicemember's] claim, there will be no need for civilian judicial intervention. Needless friction will result if civilian courts throughout the land are obliged to review comparable decisions of military commanders in the first instance." See also *Orloff* v. *Willoughby,* 345 U.S. 83, 93-94 (1953). Thus, in *Crawford,* the Fifth Circuit properly dismissed claims for equitable relief brought by members of the Texas Army National Guard "without prejudice to the reviewability of any future actions taken by the Army Board for the Correction of Military Records" (794 F.2d at 1037).

Stinson should be required to seek relief through the channels specifically made available to him by Congress and the National Guard Bureaus. Under the *Mindes* test, which requires a servicemember to exhaust his intraservice remedies (453 F.2d at 201), he plainly may not bring a direct action under Section 1981 or 1983 in lieu of pursuing his intraservice remedies. Indeed, Stinson concedes that he has failed to pursue his intraservice remedies and agrees that he will "end up before the Army Board of Corrections of Military Records" (Br. in Opp. 3-4). This is correct. We disagree with Stinson only in that he apparently thinks that, if the Board rejects his claims, he may

then proceed with his suit under Sections 1981 and 1983. In our view, his exclusive remedy should then be an appeal from the Board's ruling to a district court, which would limit its review to determining whether the Board acted arbitrarily and capriciously. However, the issue of what remedies are available to Stinson if the Board rejects his claim is not ripe for review at this time.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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